UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

KOHLER CO.

And

KEVIN BREWER, An Individual **Case 26–CA–22733**

And

JAMES SKINNER, An Individual **Case 26–CA–22744**

***Linda M. Mohns, Esq.,* for the General Counsel**
Kevin J. Kinney, Esq., and Jack G. Pawley, Esq.,
for the Respondent

SUPPLEMENTAL DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Searcy, Arkansas, on August 3, 2009. The issue in this compliance proceeding is whether the Respondent, Kohler Co., has complied with the terms of the Board's Order, dated July 18, 2008, which required the Respondent, inter alia, to reinstate Charging Parties Brewer and Skinner and make them whole for all wages and benefits lost as a result of the Respondent's discriminatory refusal to reinstate them upon their unconditional offer to return to work during a strike at the company's Searcy facility.[1]

Counsel for the General Counsel contends that the Respondent failed to comply with the order by failing to make a valid offer of reinstatement to the Charging Parties and that, as a result, back pay has continued to accrue to the present. She is seeking net back pay for Brewer in the amount of $15,574.83 and for Skinner in the amount of $14,021.86, with interest.[2] Respondent contends that it has complied with the reinstatement provisions of the Board's order by reinstating Brewer and Skinner to a list of strikers to be recalled, in order of seniority, pursuant to the terms of a settlement agreement executed by the Respondent, the General Counsel and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America – UAW, the Union representing its employees who were on strike at the Searcy facility at the time the unfair labor practices in this case were committed. The Respondent contends further that it has already made Brewer and Skinner whole for back pay from the date each was unlawfully denied reinstatement until the date the strike ended pursuant

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[1] The Board's Order adopted the June 3, 2008 decision of Administrative Law Judge George Carson II, in the absence of exceptions. The United States Court of Appeals for the Eighth Circuit enforced the Board's Order, upon the consent of the parties, on October 22, 2008.

[2] These amounts represent back pay calculated through March 31, 2009. General Counsel argues that back pay is continuing to accrue because no offer of reinstatement has ever been made. However, Counsel for the General Counsel has not updated the calculations beyond March 31, 2009.

to the settlement agreement. At that point, according to the Respondent, Brewer and Skinner would have been laid off along with all strike replacements and any other unit employees who had abandoned the strike and returned to work. Under the Respondent's defense, neither Brewer nor Skinner had sufficient seniority to be reinstated to the positions available at the end of the strike.[3]

After hearing the testimony of witnesses, reviewing the documentary evidence, and considering the arguments made by counsel at the hearing, I rendered a bench decision in accordance with Section 102.35(a)(10) of the Board's Rules and Regulations. I hereby certify the accuracy of the portion of the transcript, pages 72 through 83, as corrected, containing my bench decision.[4] A copy of that portion of the transcript is attached to this decision as the "Appendix".

Having found that the Respondent failed to comply with that portion of the Board's order requiring that it make offers of reinstatement to Brewer and Skinner, I shall require, as explained in my bench decision, that the Respondent maintain Brewer and Skinner on the striker recall list, in proper order of seniority, until such time as a position for which they are eligible, based on seniority, becomes available and that it notify each of them that it will do so. Having found further that there were no jobs available, at the conclusion of the strike, to which Brewer and Skinner could have been reinstated because they lacked sufficient seniority, I have concluded that back pay was tolled as of March 10, 2008. Because the Respondent has already made Brewer and Skinner whole for back pay accrued to March 10, no further back pay is owed to them at this time. Accordingly, I issue the following recommended[5]

ORDER

The Compliance Specification is dismissed, to the extent it seeks back pay for the period after March 10, 2008.

Dated, Washington, D.C., August 26, 2009.

Michael A. Marcionese
Administrative Law Judge

[3] There is no dispute that, pursuant to the settlement agreement, the Respondent recalled only 103 unit employees. The Respondent's contention that the number of available jobs had been substantially reduced during the strike because of economic conditions was not disputed.

[4] I have made the following corrections to the transcript:

Page 74, ln. 15-16: "offer agreeing statement" should be "offer of reinstatement"
Page 77, ln. 1 "implementing a" should read "equivalent"
Page 77, ln. 19 delete "to tell to"
Page 80, ln. 4 "disputing" should read "claiming"
Page 80, ln. 8 "their" should read 'then"
Page 85, ln. 5 "a" should read "as"

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Appendix

BENCH DECISION

I will start out by saying this was really one of the more difficult cases I've ever had to confront. On the surface it may seem pretty simple and straightforward. Certainly there is not a lot of evidence or facts in dispute. But it does raise some pretty significant issues in my mind at least. And I have thought about it a lot both before coming here today as well as throughout the course of the hearing this morning and listening to your arguments.

And so I'm prepared to make a Bench Decision, realizing that whatever decision I make here probably won't end here. Whoever is unsatisfied with my decision will probably take this to the Board and this might be very well a case that the Board might want to consider the implications of the decision. So pursuant to Section 102.35 A-10, which is the provision that allows for the rendering of Bench Decisions, I will -- I am now prepared to issue my Decision in this case.

Now this case is being heard here today pursuant to a Compliance Specification and Notice of Hearing, which issued on May 29th, 2009 and was amended this morning. And then subsequently the Respondent did file its Answer denying portions of the Compliance Specification and raising certain issues, some of which have been abandoned as exhibited by the stipulation that the parties have entered into today as Joint Exhibit 1.

So the issue remaining to be decided in this case is whether the Respondent has complied with the Board's Order and as enforced by the Court of Appeals. And in particular that portion of the Order requiring that the Respondent reinstate and make whole Charging Party's discriminatees, Mr. Brewer and Mr. Skinner.

On June 3rd, 2008, Judge Carson found in the underlying proceeding that the Respondent had violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate striking employees upon their unconditional offers to return to work.

And that Decision involved three individuals who had each filed their own unfair labor

practice charge: Mr. Brewer, Mr. Skinner, and Mr. Clifton, who is not -- whose status is not in dispute in this case. And all of them had attempted to return to work before the strike ended. The issue there was whether or not they had made an unconditional offer to return to work. Judge Carson found that they had and that Respondent violated the Act by not taking them back to work at that time and then on various dates when each were found to have made their offer.

Now as a remedy for this unfair labor practice, Judge Carson ordered that the Respondent offer reinstatement to Brewer and Skinner, acknowledging that Mr. Clifton had already been reinstated, and make all three of the discriminatees whole for any loss of earnings and benefits. And there is no dispute that Mr. Clifton has already been made whole and there is no issue with respect to compliance with that portion of the Order.

Now according to Judge Carson back pay was to run in the case of Brewer and Skinner from the date each was unlawfully denied reinstatement to the date of a proper offer of reinstatement. No exceptions were filed. And the Board so adopted the judge's Decision and issued its Order July 18th, 2008. And on October 22nd, 2008, the Eighth Circuit Court of Appeals enforced the Order by consent of the parties.

The General Counsel and Respondent having disagreed as to reinstatement and back pay, the Spec issued and we find ourselves here today. And as I indicated previously, the facts are pretty much undisputed in this case.

Now in one of the facts in particular that's not in dispute and is what causes, I think, why we're here in the first place is that, as of the date of the judge's Decision, the Respondent; the Union, which is not here today, the UAW; and the General Counsel had already entered into a Settlement Agreement in March of 2008 in another unfair labor practice case which apparently was part of this case before the settlement, alleging multiple violations of the Act. And that provided for reinstatement of 103 of the strikers as far as anyone, I guess, who had not worked during the term of the strike, whether they be strikers or crossovers or lock down employees,

however you wanted to classify them, and a preferential recall system for all of the other employees. And I think the list attached to the Settlement Agreement contains about 240 some odd names.

And there is no dispute that all three -- Mr. Clifton, Mr. Brewer, and Mr. Skinner -- their names do appear on that list. And as I've already noted, Mr. Clifton was reinstated as one of the 103 pursuant to that Settlement Agreement. And the other two, Mr. Brewer and Mr. Skinner, are on the list under the preferential recall provisions of that Settlement Agreement.

Now also it's clear that in the Settlement Agreement itself the parties specifically reserved General Counsel's right to prosecute these particular charges that we're dealing with compliance now. And it specifically said that nothing in the agreement will limit the back pay or reinstatement rights of the Charging Parties in those cases, meaning these cases. And so everybody obviously knew that was there when they signed it and they recognized it and agreed to it.

Now today I did hear testimony from Mr. Stone, the Plant Manager at the Kohler Plant here in Searcy, as to the steps the Respondent took to comply with the Settlement Agreement, namely recalling the 103 individuals from that list by first by order of department seniority and then about a year later after that practice had been challenged by the Union through the grievance and arbitration procedure in order of Plant seniority. And there's no dispute that under either Plant or department seniority that neither Brewer nor Skinner would have been among the first 103 individuals that were recalled on March 10th.

There's also no dispute that no additional employees on the recall list have been recalled since March 10th, 2008. And in fact, according to Mr. Stone, through attrition there are now only 74 employees remaining in the Plant, including as far as I know, Mr. Clifton is still working there.

Now the first issue as raised by the Compliance Specification and as outlined in the parties' arguments is whether or not the Respondent has complied with the Order requiring it --

and that's Paragraph 2-A of Judge Carson's Order -- to offer Brewer and Skinner full reinstatement to their former jobs or if those jobs no longer exist, to substantially equivalent positions.

Now Respondent takes the position that it did comply with this portion of the Order by sending Mr. Brewer and Mr. Skinner a copy of the Notice that was part of the Settlement Agreement in the other parts of this case on March 31st, which references the recall of the 103 employees and the preferential recall rights for everyone else, including the names of Mr. Brewer and Mr. Skinner.

Now General Counsel takes the position that that is not an effective offer of reinstatement. And there's no dispute. The parties have stipulated that there were no other communications between Respondent and either Mr. Brewer or Mr. Skinner after Judge Carson's Order other than the one letter informing them that any reference to the failure to recall has been expunged from their record.

As General Counsel has pointed out, the Board has consistently held that a reinstatement offer to a discriminatee must be specific, unequivocal, and unconditional in order to toll back pay. And it is the Respondent's burden to establish that such an offer was made. And General Counsel cites ADSCO Manufacturing Corporation. That's A-D-S-C-O. And the case cite is 322 NLRB 217 at Page 218, a 1996 case. And there, I'm sure, have been many cases subsequent to that.

Now I find that in agreement with the General Counsel that Respondent has not met its burden here. The March 31st Notice, which was not specifically addressed to Brewer or Skinner that was sent before their case had even been heard nor any violation found, does not satisfy the requirement of a specific unconditional or unequivocal offer of reinstatement.

Now Respondent could have sent a letter with the Notice specifically advising Mr. Brewer and Mr. Skinner of their specific rights and pointing at to the preferential recall list as governing their reinstatement in the event after the upcoming hearing that Respondent had

been found to violate the Act. But there is not evidence that any such communication took place.

Respondent could also have sent a letter after Judge Carson's Order issued or after the Board adopted that Order or even after the Court of Appeals issued its judgment by consent of the parties specifically stating, "That to the extent we are required to reinstate you, please be advised," and then explaining what Respondent's position was with respect to their reinstatement rights. But there's no evidence that any such communication was made to them.

I, therefore, agree with the General Counsel that Respondent has not satisfied its burden of proof that an offer of reinstatement was made, regardless of how you define the word reinstatement.

Now under a normal Reinstatement Order, back pay would normally continue to run until such time as a valid, effective offer of reinstatement is made. But this case presents at least in my view some unique circumstances which lead me to find that back pay is not due for the period after March 10th of 2009, regardless of whether or not an effective offer of reinstatement was made.

Now Respondent has not only denied that it failed to offer reinstatement to the discriminatees, but it has essentially argued in its Answer and here today that any back pay would have been tolled as of March 10th because the Respondents could not have been reinstated to their former positions or a substantially equivalent position because such positions did not exist based on the seniority that they held at the time of the unfair labor practice.

Now the Board's policy with respect to remedial orders has always been to restore the status quo ante to the extent possible. And essentially what that means is to place the discriminatees in the position that they would have been in but for the unfair labor practice.

Now here in this case had Respondent not violated the Act, Mr. Brewer and Mr. Skinner would have been reinstated upon their offers to return to work on or about -- I think one was February 14th, 2007 and the other was on or about February 23rd, 2007. And they would have

continued to work until March 8th, 2008, over a year, when they would have been laid off along with the other replacement employees and crossover employees who were terminated at that time pursuant to the Settlement Agreement.

Which, you know, no one is claiming that the Settlement Agreement is unlawful or in violation of the Act or in any way nefarious. And then they would have been reinstated subsequent to that, if at all, based on their first department wide and then Plant wide seniority.

Now as we all know, Mr. Clifton, because he had sufficient seniority, he was in fact reinstated and made whole at that time. With respect to Mr. Brewer and Skinner, since there's no dispute that they did not have sufficient department or Plant wide seniority to be reinstated on March 10th, they were made whole through March 10th, but their reinstatement rights after that, had there been no ULP, would have been like everyone else, the majority of people in the Bargaining Unit, who would have remained on a preferential recall list until such time as a job opening arose.

To award back pay and require immediate reinstatement now as proposed by the General Counsel would amount to a grant of super seniority to these employees based on their having abandoned the strike before it came to an end. This is contrary to the policy of the Board that's articulated by the Board and the court in the George Banta Company, Incorporated and by the Supreme Court in the Erie Resistor court cited by the Respondent.

Now I agree with the General Counsel that back pay and reinstatement rights in NLRB proceedings are not private rights but vindication of public policy. But at the same time the Board and the courts have consistently held that the Board's orders are purely remedial, not punitive. To require the Respondent to reinstate Mr. Brewer and Mr. Skinner now, displacing if necessary a more senior employee, and to make them whole for back pay since March 10th would not only be punitive, but it would be contrary to the policy under the Act against penalizing employees who exercise their statutory right to strike.

Now while General Counsel says in her closing argument that they are not seeking

super seniority for Mr. Brewer and Skinner, the practical effect of what she is requesting would be to give them more seniority rights than other employees who did not abandon the Union simply because they exercised their right to abandon the strike and return to work. Their continued presence in the Plant would have an adverse impact on the seniority rights of other employees who remain out of the Plant on the list awaiting recall.

Now my decision here, I believe, is consistent with Judge Carson's Order, which adopted by the Board and enforced by the court, because it recognizes that, while Respondent did not make a valid offer of reinstatement, there was in fact no position available to reinstate them to at the time of the Order. Similar to many other cases where by the time the Board issues its Order reinstatement is unavailable because of intervening circumstances, whether they be economic or otherwise such as Plant closure or lack of work.

Similarly my decision, I believe, is consistent with the Settlement Agreement because while the Settlement Agreement specifically stated that nothing in the agreement would limit the back pay or reinstatement rights of the Charging Party in those cases, meaning these cases, their back pay and reinstatement rights have not been limited by my Recommended Order in this case. They still have a right to be reinstated, the same right that they would have had to be reinstated had Respondent never committed the unfair labor practice in the first place which is in accordance with their Plant wide seniority.

Now of course, under my findings and conclusions today, both Mr. Brewer and Mr. Skinner retain their rights to reinstatement in accordance with their Plant wide seniority until either a job opens, they abandon their reinstatement rights, or the Plant should close.

In conclusion, having found that Respondent did not comply with that portion of the Order that required that an offer of reinstatement be made, I shall recommend that Respondent be directed to specifically extend to the Charging Parties the offer of reinstatement as envisioned by the Settlement Agreement with respect to what their rights are for preferential recall. But I will not recommend that any additional back pay be paid to the two disciminatees.

All right, with that that concludes my decision in this case.

Pursuant to the Board's Rules and Regulations, upon receipt of the transcript, I will issue a formal written Order, which adopts the portions of the transcript pages that contain my Bench Decision. At that point all parties have a right to file exceptions with the Board in Washington. And I'll refer you to the Statement of Procedures and the Board's Rules and Regulations with respect to the procedure to follow in filing your exception.

All right, if there is -- and nothing further, then the hearing is closed. Thank you all very much.